In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-904

DEPOSIT GUARANTY NATIONAL BANK,
JACKSON, MISSISSIPPI,
Petitioner,

vs.

ROBERT L. ROPER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

On Petition of Deposit Guaranty National Bank of Jackson, Mississippi, and by order entered here on March 5, 1979, a writ of certiorari issued to the United States Court of Appeals for the Fifth Circuit to review its decision, entered August 24, 1978, reversing the District Court's order denying a Rule 23(b)(3) class action status in a suit asserting liability for the penalties of usury in favor of a "class" of 90,000 credit card customers of the defendant bank.

OPINIONS BELOW

The opinion of the United States District Court is not officially reported. The opinion of the Court of Appeals for the Fifth Circuit is reported at 578 F.2d 1106.

Both are appended. Also included is the Judgment of the District Court dismissing the Complaint on payment of the amount demanded.

JURISDICTION

Jurisdiction is based on 28 U.S.C., §1254(1). The Court of Appeals entered its decision on August 24, 1978 and denied re-hearing on October 20, 1978. The Petition for the Writ was filed here on November 29, 1978.

QUESTIONS PRESENTED ON REVIEW

I.

For jurisdictional purposes, does a Complaint seeking damages (penalties of usury), when coupled with a class action request, survive the death of the controversy between the named parties before the Court, when the death is occasioned by an effective tender to the named plaintiff of his total damage after the District Court, on a full record, has been afforded the opportunity to certify the class but has entered an order declining to certify the suit for class action status?

II.

Does a case in which Rule 23(b)(3) class action status is requested, but denied by the District Court, become moot when the nominal plaintiff is paid in full, after such denial, and no longer maintains a personal interest stake in the outcome of the litigation?

Since the remaining questions, as tendered by the Petition, were not included in the order granting review, these are not re-stated here.

STATEMENT OF THE CASE

Two individual credit card holders appeared as the named plaintiffs in an action filed in the Mississippi District Court. The plaintiffs alleged violation of the Mississippi statutes on usury and sought to recover for violation of these state statutes to the degree allowed by the National Banking Act. (12 U.S.C., §§85-86, Addendum to Brief, Add. B and C, infra) The Amended Complaint (A. 9-17, 24-25), filed on March 6, 1972, claimed that it was in behalf of the plaintiffs and others "similarly situated", reference being to 90,000 other unnamed credit card holders.[1] A class certification was requested by motion. (A. 18) The Complaint, as amended and supplemented, includes a four-year period prior to the revision of the state's interest statutes in 1974.

Over a period of more than four years, a massive record was developed on the "class action" issue. Acting upon this and in the light of several conferences with the Court, an order was finally entered denying class action status. The comprehensive opinion of the District Court is found in the Appendix. (A. 29-47)

On the Rule 23(b)(3) class action issue, the District Court found, in sum, that: (1) the plaintiffs could not fairly and adequately represent the class because they were neither willing nor able to finance the case as a class action; (2) by pragmatic standards, the case was unmanageable as a class action; (3) a class action was not superior to other available methods for the fair and efficient adjudication of the controversy, especially in view of (a) the availability of traditional procedures for prose-

1. The Complaint also included a Count seeking recovery under the Truth-In-Lending Act, but this Count was abandoned and dismissed on the plaintiffs' motion. (A. 55, 56)

cuting individual actions and the undesirability of concentrating the litigation of claims in this federal forum; (b) the substantive law and policy of the state which views the aggregation of usury claims as a "legal fraud" and unfair to the lender;[2] (c) the invidious discrimination which would be imposed upon national banks in the enforcement of usury laws contrary to the intent of the National Bank Act; (d) the horrendous penalty sought to be imposed, which could result in destruction of the bank and benefit no one substantially other than the attorneys, and (e) the tremendous burden which would be imposed upon the Court in attempting to handle 90,000 claims to the detriment of other deserving litigants who had at least equal claim upon the Court's time and energies. (A. 29-47)

The final order (A. 48-49), entered October 15, 1975, overruled the motion for class certification and directed that the case proceed in all respects upon the individual complaints as in other cases. A request for leave to appeal from the interlocutory order was denied. (A. 50)

Over seven months after certification was so thus denied, the defendant, weary of the litigation, tendered to the named plaintiffs all that they demanded, plus legal interest and court costs.[3] (A. 51-54) No one else having sought to intervene and assert claims, the District Court accepted this tender, over the lawyers' objection, as an appropriate disposition of the case, and ordered that the Complaint be dismissed. (A. 57-58, 60-61) The money

2. *Liddell* v. *Litton Systems, Inc.*, 300 So.2d 55 (Miss. 1974). Cf. *Deposit Guaranty Bank & Trust Co.* v. *Williams*, 193 Miss. 432, 9 So.2d 638 (1942); *Fry* v. *Layton*, 191 Miss. 17, 2 So.2d 561 (1941).

3. Contemporaneously with the tender and on motion in behalf of the nominal plaintiffs, the Truth-In-Lending Count of the Complaint was voluntarily dismissed with prejudice. (A. 55, 56)

was paid into Court, as authorized by the Court's order. (A. 62) The plaintiffs thereby received all that they demanded and all that they could recover in their suit.

No contention has ever been made that the nominal plaintiffs did not receive by the Court approved tender everything demanded by them in the complaint which used their names, and no appeal was noticed in their behalf. There was no appeal by the nominal plaintiffs in their own right, but their attorneys filed a notice of appeal in plaintiffs' names, purportedly and only "on behalf of all others similarly situated". (A. 63) However, not one potential member of the unnamed and uncertified class had sought to intervene for purposes of appeal or to join in or authorize the attempted appeal.

The bank moved for dismissal of the appeal on the ground that the case was moot. (A. 64-65) The Fifth Circuit carried the motion with the case and then overruled the motion and proceeded to reverse the orders of the District Court and to direct certification of a class. (A. 65-88, 578 F.2d 1106) To summarize the holding:

On the mootness question, the Court held that by the very act of filing a complaint as a class action, the nominal plaintiffs assumed a duty to the potential class which precluded them from taking satisfaction and were not only permitted but were duty-bound to appeal a denial of certification, unless excused by the Court. Despite the plaintiffs' complete loss of all personal financial interest in the case, the Court held, nevertheless, that "the individual plaintiffs would maintain a stake in procuring class-wide relief", because, it was said, they maintained a "nexus" with the "class" despite the mootness of their own claims, and that a "case or controversy" persisted. (A. 74-76, 578 F.2d at 1110-1111)

SUMMARY OF ARGUMENT

The action was moot on arrival at the Court of Appeals. The nominal plaintiffs had received full satisfaction and maintained no personal interest stake in the outcome. The putative Rule 23(b)(3) "class" was never certified but was rejected by the District Court.

On tender of the full amount demanded by the named plaintiffs, their own claims became moot because they no longer had a personal interest stake in the case. It is the tender itself that moots the case. *A. A. Allen Revivals, Inc.* v. *Campbell*, 353 F.2d 89 (CA 5, 1965); *Lamb* v. *Commissioner*, 390 F.2d 157 (CA 2, 1968); *State of California* v. *San Pablo & T. R. Co.*, 149 U.S. 308, 13 S.Ct. 876 (1893).

The tender was made *after* the District Court had *denied* a motion to certify the case as a class action under Rule 23(b)(3), and had entered an order *declining* to certify a class.

This tender was accepted by the District Court as an appropriate disposition of the case. The order of dismissal provided that it was "without advantage or prejudice to any of the parties or others". (A. 61) This terminated the controversy between the named parties before the Court.

Since the "class" was never certified by the District Court, it had not acquired a legal status when the case arrived at the appellate level, and its unnamed potential members were not parties before that Court. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917 (1976).

The jurisdictional standard bearer must "stand to profit in some personal interest" in order to maintain standing

to invoke the Court's continuing jurisdiction. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, supra.

It is not enough that a case or controversy exists when the complaint is filed. It must exist at each and every stage of the proceeding, including appellate stages. *Sosna* v. *Iowa*, 419 U.S. 393, 95 S.Ct. 553 (1975); *Prieser* v. *Newkirk*, 422 U.S. 395, 95 S.Ct. 2330 (1975); *Steffel* v. *Thompson*, 415 U.S. 452, 94 S.Ct. 1209 (1974), N. 10 at 94 S.Ct. 1216.

It has been held that a "class", when properly certified by the District Court, attains a legal status separate from the interest asserted by the plaintiff and that certification may prevent the action from becoming moot when the plaintiff ceases to maintain a personal interest stake, if a live controversy remains as between members of the certified class and the defendant. *Sosna* v. *Iowa*, 419 U.S. 393, 95 S.Ct. 553 (1975); *Gerstein* v. *Pugh*, 420 U.S. 103, 95 S.Ct. 854 (1975); *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 96 S.Ct. 1251 (1976); *Zablocki* v. *Redhail*, ... U.S. ....., 98 S.Ct. 673 (1978), N. 9, at 679.

However, in at least five "class action" situations, this Court has rejected the claim to legal status of the "class" and has directed dismissal for mootness, where the District Court has either failed to duly certify a class or has expressly declined to certify the class and the nominal plaintiff fails to maintain his personal interest stake in the action. *O'Shea* v. *Littleton*, 414 U.S. 488, 94 S.Ct. 669 (1974) (unconstitutional practices in the administration of criminal justice); *Board of School Commissioners of City of Indianapolis* v. *Jacobs*, 420 U.S. 128, 95 S.Ct. 848 (1975) (unconstitutional interference with news publication); *Baxter* v. *Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551 (1976) (unconstitutional prison disciplinary procedures); *Weinstein* v. *Bradford*, 423 U.S. 147, 96 S.Ct. 347 (1975) (viola-

tion of procedural rights in considering eligibility of prisoners for parole); *Pasadena City Board of Education* v. *Spangler,* 427 U.S. 424, 96 S.Ct. 2697 (1976) (unconstitutional segregation in high schools).

In order to become a class action for purposes of conferring litigant status upon members of the class, it must be first certified. As held in *Kremens* v. *Bartley,* 431 U.S. 119, 97 S.Ct. 1709 (1977):

> ". . . And it is only a 'properly certified' class that may succeed to the adversary position of a named representative whose claim becomes moot. Board of School Comm'rs v. Jacobs, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975)." (97 S.Ct. at 1717)

Therefore, it follows that the case at bar never became a class action and members of the class never attained a legal status as parties before the Court and did not succeed to the adversary position once held by the nominal plaintiffs.

The Fifth Circuit suggested that the tender was to "short circuit a class action by paying off the class representative", but there was nothing wrong about the tender. The defendant simply exercised the traditional right of every defendant who is sued to buy peace. That right was one of substance. Settlements are highly favored. *Pearson* v. *Ecological Service Corp.,* 522 F.2d 171 (CA 5, 1975), cert. den. sub nom., 425 U.S. 912, 96 S.Ct. 1508 (1976).

The disposition of the litigation by this means harmed no one. The payment in satisfaction of the named plaintiffs did not affect, but carefully preserved, the rights of anyone else who might wish to come forward and assert claims in the future.

Since no class was certified, the potential members were never parties. The "class" had no legal status. No one

else sought to intervene, either before or after the order of dismissal, as in the cited case of *United Airlines, Inc.* v. *McDonald,* 432 U.S. 385, 97 S.Ct. 2464 (1977), although the seven months' lapse of time between the denial of class certification and the final order of dismissal afforded ample time.

By reason of the tender, mootness became a fact as did the non-existence of a continuing live controversy as between any parties before the Court.

It is the *fact* of mootness and not the *cause* of it that counts on the jurisdictional issue. The mootness may arise by act of the parties or otherwise. Cf. *United States* v. *Alaska S.S. Co.,* 253 U.S. 113, 40 S.Ct. 448 (1920); *State of California* v. *San Pablo & T. R. Co.,* 149 U.S. 308, 13 S.Ct. 876 (1893).

The case at bar does not fall within any recognized or suggested exceptions to the mootness doctrine.

There is no violation of federal law which is "capable of repetition, yet evading review". No injunctive relief is sought. The alleged violation of the state's usury statutes is not capable of repetition, because Mississippi amended its interest laws in 1974 to allow service charges in excess of those complained of here and made the statute retroactive. (Add. D, infra)

Unlike the Civil Rights cases which are quasi-public in nature, the instant case is a purely commercial type lawsuit seeking a money recovery only in behalf of the named plaintiffs. The only thing out of the ordinary about it is the effort, in the plaintiffs' names, to solicit, under the aegis of the Court, some 90,000 potential small claims for litigation in the federal district court, with the constant danger, if not the certainty, that the action will degenerate in practice into multiple lawsuits to be separately tried.

There is no significant public interest involved. Instead, the aggregation of usury claims in the class action format violates the articulated public policy of the state and is viewed and condemned on the state level as a legal fraud.[4]

There are no reforms left to be made, social or otherwise. There is no overwhelming federal social policy involved. In brief, there are no circumstances present here which might serve as a temptation to broaden the traditional concept of a "case or controversy" for jurisdictional purposes.

The view that the mere filing of a damage action as a class action makes it such and creates fiduciary duties to the unknown members of a putative class which prevents termination of the action by satisfaction or dismissal without appeal simply re-writes Rule 23 and requires that every case involving class action allegations will have to be tried on its merits in the District Court and reviewed on appeal before an end can be brought to the action. The adverse impact of such a decision upon both litigants and courts should be obvious.

No such court-appointed "duty" to continue litigation after the personal interest stake has been lost has ever heretofore been considered as a substitute for the personal stake required for Article III jurisdiction.

The decision of the Fifth Circuit is in direct conflict with the Seventh Circuit's decision in *Winokur* v. *Bell Federal Savings and Loan*, 560 F.2d 271 (CA 7, 1977), reh. denied en banc, 562 F.2d 1034, cert. den., 98 S.Ct. 1507

4. See *Fry* v. *Layton*, 191 Miss. 17, 2 So.2d 561 (1941), and *Liddell* v. *Litton Systems, Inc.*, 300 So.2d 455 (Miss., 1974). Cf. Point II, pp. 19-21, Petition for Writ of Certiorari, this Case No. 78-904; Opinion of the U. S. District Court. (A. 43)

(1978), and with its own prior decision in *Pearson* v. *Ecological Service Corp.*, 522 F.2d 171 (CA 5, 1975), cert. denied sub nom., 425 U.S. 912, 96 S.Ct. 1508 (1976).

Also, the decision conflicts with the five decisions of this Court, above cited, by which this Court is committed to these principles: (1) a continuing live controversy is essential as a jurisdictional base; (2) the live controversy must be one between parties having a legal status before the Court; (3) the mere filing of a complaint seeking class certification does not confer legal party status on the class or on its members; (4) without proper certification by the trial court, the "class" does not attain legal status unless the case falls into the very narrow exception where the asserted wrong to the plaintiff is "capable of repetition, yet evading review".

The decision of the Fifth Circuit should be vacated and the judgment of dismissal entered by the District Court should be reinstated.

ARGUMENT

I.

Preliminary Comment on the Fifth Circuit's Class Action Position

Writing for the Second Circuit[5] in 1973, Judge Medina lamented that "Class actions have sprouted and multiplied like the leaves on the green bay tree". In the same opinion, much of the blame was placed on the adoption of "the erroneous and frustrating view that some way *must* be found to make the case viable as a class action". Since 1973, class actions have continued to sprout and multiply at an ever increasing rate.

The Fifth Circuit has embraced the "must" philosophy, viewed by other courts as erroneous and frustrating. The Court's first adoption of this approach was in the context of suits involving violations of the Civil Rights Act of 1964. The theory was that such cases were quasi-public and class actions by nature, whether so-called or not. The plaintiff became a private Attorney General and the Court assumed a special responsibility to resolve the dispute and protect the class. Cf. *Jenkins* v. *United Gas Corp.*, 400 F.2d 28 (CA 5, 1968); *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303 (CA 5, 1970).

The spurious class action under Rule 23(b)(3) is not imbued with such policy consideration, however, and is not a class action by nature, and the same court in *Pearson* v.

5. *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (CA 2, 1973), affirmed, 417 U.S. 156, 94 S.Ct. 2140 (1974). In *Eisen II*, *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555 (CA 2, 1968), Judge Lumbard, dissenting, observed that: ". . . Rule 23 does not require or contemplate that courts will hear causes of action as class actions merely because they will not get to hear the case any other way. . ." (391 F.2d at 572)

Ecological Service Corp., 522 F.2d 171 (CA 5, 1975), reh. denied en banc, 562 F.2d 1034, cert. den., 96 S.Ct. 1508 (1976) held that a settlement between the nominal parties after a denial of class action status under Rule 23(b)(3) rendered the case moot and beyond the Court's review jurisdiction.

The issue in the case at bar is even further removed from the pressures of broad federal policy considerations than was the securities fraud issue in *Pearson*, supra, yet the Fifth Circuit proceeded to ignore its previous holding in that case and to adopt the same exceptional "must" treatment previously reserved for Civil Rights cases, thereby raising critical jurisdictional questions in the context of spurious class action attempts, which arise from:

(a) The use of a vague "nexus" test to determine mootness in the place of the "personal interest stake" test announced by this Court;

(b) The conferring of litigant status upon an uncertified putative class, despite trial court denial of class action status, in order to retain jurisdiction under the requirement for existence of a live case or controversy;

(c) The fixing of a duty upon a nominal plaintiff to reject satisfaction of his own claim, when tendered after an adverse ruling on the certification claim, and the duty to appeal an order denying class action status unless excused by the court, - thereby forcing merits trials and appeals in all cases filed as class action attempts, whether certified for class status or not.

The mootness decision of the Fifth Circuit is in conflict with decisions of other Courts of Appeal and, in principle, with its own prior decision. It also adopts and implements a test for mootness which is at variance with and in contradiction of decisions of this Court.

II.

The Nominal Plaintiffs Retained No Personal Interest Stake and As to Them, the Case Was Dead on Arrival at the Appellate Level

On tender of the full amount demanded by the named plaintiffs, their own claims became moot because they no longer had a personal interest stake in the case. It is the tender itself that moots the case. *A. A. Allen Revivals, Inc.* v. *Campbell*, 353 F.2d 89 (CA 5, 1965); *Lamb* v. *Commissioner*, 390 F.2d 157 (CA 2, 1968); *State of California* v. *San Pablo & T. R. Co.*, 149 U.S. 308, 13 S.Ct. 876 (1893).

The tender was made *after* the District Court had *denied* a motion to certify the case as a class action under Rule 23(b)(3), and had entered an order *declining* to certify a class.

This tender was accepted by the District Court as an appropriate disposition of the case. The order of dismissal provided that it was "without advantage or prejudice to any of the parties or others". (A. 61) This terminated the controversy between the named parties before the Court.

III.

The Putative Class Never Acquired a Legal Status and Cannot Supply "Case or Controversy" Jurisdiction

The "class" was never certified by the District Court. It, therefore, had not acquired a legal status when the case arrived at the appellate level, and its unnamed potential members were not parties before that Court.

The possession of an existing live case or controversy by a party with legal status before the Court is a constitutional condition precedent to the existence of federal court jurisdiction under Article III, Constitution of the United States. (Add. A, infra) As expressed in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917 (1976):

> "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. See Flast v. Cohen, 392 U.S. 83, 95, 88 S.Ct. 1942, 1950, 20 L.Ed.2d 947, 958 (1968). The concept of standing is part of this limitation. . . ." (96 S.Ct. at 1924)

It is not enough that a case or controversy exist when the complaint is filed. It must exist at each and every stage of the proceeding, including appellate stages. *Sosna* v. *Iowa*, 419 U.S. 393, 95 S.Ct. 553 (1975); *Prieser* v. *Newkirk*, 422 U.S. 395, 95 S.Ct. 2330 (1975); *Steffel* v. *Thompson*, 415 U.S. 452, 94 S.Ct. 1209 (1974), N. 10 at 94 S.Ct. 1216.

As expressed in *Sosna* v. *Iowa*, supra:

> ". . . There must not only be a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23, but there must be a live controversy at the time this Court reviews the case. . . ." (95 S.Ct. at 559)

The jurisdictional standard bearer must "stand to profit in some personal interest" in order to maintain standing to invoke the Court's continuing jurisdiction. As put in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, supra:

> "The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal

interest remains an Art. III requirement. A federal court cannot ignore this requirement without overstepping its assigned role in our system of adjudicating only actual cases and controversies. . . ." (96 S.Ct. at 1925)

It has been held that a "class", when properly certified by the District Court, attains a legal status separate from the interest asserted by the plaintiff and that prior certification may prevent the action from becoming moot when the plaintiff ceases to maintain a personal interest stake, if a live controversy remains as between members of the certified class and the defendant. *Sosna* v. *Iowa,* 419 U.S. 393, 95 S.Ct. 553 (1975); *Gerstein* v. *Pugh,* 420 U.S. 103, 95 S.Ct. 854 (1975); *Franks* v. *Bowman Transportation Co., Inc.,* 424 U.S. 747, 96 S.Ct. 1251 (1976); *Zablocki* v. *Redhail,* ..... U.S. ....., 98 S.Ct. 673 (1978), N. 9 at 679.

In *Sosna* v. *Iowa,* supra, the Court noted that the certification of a suit as a class action has important consequences for the unnamed members of the class (Footnote 8, 95 S.Ct. at 557) and there held:

> ". . . When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant. . . ." (95 S.Ct. at 557)

However, in at least five "class action" situations, the Court has rejected the claim to legal status of the "class" and has directed dismissal for mootness, where the District Court has either failed to duly certify a class or has expressly declined to certify the class and the nominal plaintiff fails to maintain his personal interest stake in the action. *O'Shea* v. *Littleton,* 414 U.S. 488, 94 S.Ct. 669 (1974)

(unconstitutional practices in the administration of criminal justice); *Board of School Commissioners of City of Indianapolis* v. *Jacobs,* 420 U.S. 128, 95 S.Ct. 848 (1975) (unconstitutional interference with news publication); *Baxter* v. *Palmigiano,* 425 U.S. 308, 96 S.Ct. 1551 (1976) (unconstitutional prison disciplinary procedures); *Weinstein* v. *Bradford,* 423 U.S. 147, 96 S.Ct. 347 (1975) (violation of procedural rights in considering eligibility of prisoners for parole); *Pasadena City Board of Education* v. *Spangler,* 427 U.S. 424, 96 S.Ct. 2697 (1976) (unconstitutional segregation in high schools). Expressions taken from these cases are noted below.

The case most frequently cited is *Board of School Commissioners of the City of Indianapolis* v. *Jacobs,* supra. In this case, a group of school students who were involved in the publication of a student newspaper filed suit alleging that the school board unconstitutionally issued rules which interfered with the publication. The action was filed as a class suit. It was never certified. On appeal, it was determined that the named plaintiffs had graduated. It was held that the graduation caused the case to become moot as to the named plaintiffs and in the absence of due certification by the trial court, the case was completely moot and beyond consideration on appeal for want of jurisdiction. The Court held:

> ". . . Because the class action was never properly certified nor the class properly identified by the District Court, the judgment of the Court of Appeals is vacated and the case is remanded to that court with instructions to order the District Court to vacate its judgment and to dismiss the complaint." (95 S.Ct. at 850)

Baxter v. *Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551 (1976), was a class action challenge to prison disciplinary proceedings on constitutional grounds. The District Court was said to have treated the suit as a class action but without formal certification. The Court said:

> ". . . Without such certification and identification of the class, the action is not properly a class action. Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975). . . ." (96 S.Ct. at 1554)

In *Pasadena City Board of Education* v. *Spangler*, supra, the Court again emphasized that absent a formal certification of a class, the case is moot when the named plaintiff no longer has a personal stake in the case, and that this is so despite the fact that the parties informally treated it as a class action and its potential members continued to have an interest in the outcome. The Court said:

> ". . . But these arguments overlook the fact that the named parties whom counsel originally undertook to represent in this litigation no longer have any stake in its outcome. As to them the case is clearly moot. And while counsel may wish to represent a class of unnamed individuals still attending the Pasadena public schools who do have some substantial interest in the outcome of this litigation, there has been no certification of any such class which is or was represented by a named party to this litigation. Except for the intervention of the United States, we think this case would clearly be moot. Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975); Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed. 2d 74 (1975)." (96 S.Ct. at 2702)

It is clear that the filing of a suit as a "class action" does not make it a class action. In *Rossin* v. *Southern Union Gas Co.*, 472 F.2d 707 (CA 10, 1973), the Court said:

> "We note in passing that a class action does not exist merely because it is so designated by the pleadings. Cash v. Swifton Land Corp., 434 F.2d 569 (6th Cir., 1970)."

In order to become a class action for purposes of conferring litigant status upon members of the class, it must be first certified. As held in *Kremens* v. *Bartley*, 431 U.S. 119, 97 S.Ct. 1709 (1977)

> ". . . And it is only a 'properly certified' class that may succeed to the adversary position of a named representative whose claim becomes moot. Board of School Comm'rs v. Jacobs, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975)." (97 S.Ct. at 1717)

To summarize, this Court is committed to these principles: (1) a continuing live controversy is essential as a jurisdictional base; (2) the live controversy must be one between parties having a legal status before the Court; (3) the mere filing of a complaint seeking class certification does not confer legal party status on the class or on its members; (4) without proper certification by the trial court, the "class" does not attain legal status unless the case falls into the very narrow exception where the asserted wrong to the plaintiff is "capable of repetition, yet evading review".

Therefore, it follows that the case at bar never became a class action and members of the class never attained a legal status as parties before the Court and did not succeed to the adversary position once held by the nominal plaintiffs.

IV.

The Tender Represented Exercise of a Substantive Lawful Right and May Not Be Disregarded to Create Jurisdiction

By reason of the tender, mootness became a fact as did the non-existence of a continuing live controversy as between any parties before the Court.

It is the *fact* of mootness and not the *cause* of it that counts on the jurisdictional issue. The mootness may arise by act of the parties or otherwise.

In *United States* v. *Alaska S. S. Co.*, 253 U.S. 113, 40 S.Ct. 448 (1920), the Court said:

> ". . . Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly. . . ." (40 S.Ct. at 449)

In *State of California* v. *San Pablo & T. R. Co.*, 149 U.S. 308, 13 S.Ct. 876 (1893), the Court held that an action was mooted by tender of all sums which could be recovered, despite the refusal of the plaintiff to accept the tender.

To maintain a personal money stake, the plaintiffs' financial interest must be real and direct. *O'Shea* v. *Littleton*, 414 U.S. 488, 94 S.Ct. 669 (1974). Emotional involvement is not enough to meet the case or controversy requirement. Otherwise, few cases could ever become moot. *Ashcroft* v. *Mattis*, 431 U.S. 171, 97 S.Ct. 1739 (1977).

The Seventh Circuit, in *Winokur* v. *Bell Federal Savings and Loan*, 560 F.2d 271 (CA 7, 1977), reh. den. en banc, 562 F.2d 1034, cert. den., 98 S.Ct. 1507 (1978), was presented with essentially the identical situation on a class action complaint seeking damages for violations of the Securities Exchange Act. After entry of an order declining

to certify the case as a class action, a tender was made and the case was dismissed by order over the plaintiffs' objection. On appeal, plaintiffs sought review of the order declining certification. The Court held that the case was moot and it lacked review jurisdiction. After an in-depth review of recent cases from the Supreme Court, the Seventh Circuit held:

> "When there is no determination that an action be maintained as a class action and the controversy between the named party in his own interest and his opponent dies, court adjudication is not appropriate because there is no controversy between parties who are present or represented before the court in the action." (560 F.2d at 277)

Because of mootness, several other circuits, after analyzing the recent decisions of the Supreme Court, have rejected appeals from denials of class certification in the face of satisfactions of the claims of the named plaintiffs. For example, see *Napier* v. *Gertrude*, 542 F.2d 825 (CA 10, 1976) (release of plaintiff from custody); *Vun Cannon* v. *Breed*, 565 F.2d 1096 (CA 9, 1977) (release from custody); *Boyd* v. *Justices of Special Term*, 546 F.2d 526 (CA 2, 1976) (demand by indigent for assignment of counsel in divorce case was met).

In *Pearson* v. *Ecological Service Corp.*, 522 F.2d 171 (CA 5, 1975), cert. den. sub nom., 425 U.S. 912, 96 S.Ct. 1508 (1976), a securities fraud action, the Fifth Circuit affirmed an order dismissing a class action complaint for mootness based upon an order approving a compromise settlement between the defendant and nominal plaintiffs, despite non-involvement of the "class" and the vigorous objections from a potential class member who sought to intervene. The *Pearson* court recognized the effect of a *denial* of certification as effective to strip the case of all class action characteristics[6] and to open the way for disposition of

6. See also Advisory Committee's Notes to Rule 23, cited in the opinion.

the case by a settlement which excluded the uncertified class, and the Court expressly declined to review the class denial for possible error. This case was cited in the Roper opinion but the decision was ignored.

Even in those cases which are of such public significance as to tempt the courts to carve out an exception to the mootness doctrine, this Court has not allowed the fact of mootness to escape the Article III limitation on jurisdiction merely because a satisfaction of the party's demands was by voluntary act of the parties. For example, see *Indiana Employment Security Division* v. *Burney,* 409 U.S. 540, 93 S.Ct. 883 (1973), where the class action was mooted by a full payment of the plaintiff's financial claim to unemployment benefits under the Social Security Act. Also, *Weinstein* v. *Bradford,* 423 U.S. 147, 96 S.Ct. 347 (1975), where the granting of a parole eliminated the plaintiff's grievance against parole procedures alleged to be unconstitutional.

In *Indiana Employment Security Division* v. *Burney,* supra, the Court held:

> "The full settlement of Mrs. Burney's financial claim raises the question whether there continues to be a case or controversy in this lawsuit. Though the appellee purports to represent a class of all present and future recipients of unemployment insurance, there are no named representatives of the class except Mrs. Burney, who has been paid. . . ." (93 S.Ct. at 884)

There was nothing wrong about the tender. The defendant simply exercised the traditional right of every defendant who is sued to buy peace. Even then, the tender was first submitted to and approved by the District Court.

(A. 57-61) No effort was made to prevent a ruling on the motion for class certification. The disposition of the litigation by this means harmed no one. The payment in satisfaction of the named plaintiffs did not affect, but carefully preserved, the rights of anyone else who might wish to come forward and assert claims in the future. The dismissal was ordered expressly "without advantage or prejudice to any of the parties or others upon any issue or question of liability to the named plaintiffs or others." (A. 61) There was no trial or judgment on the merits of the case. There was no res judicata.

Since no class was certified, the potential members were never parties. The "class" had no legal status. No one else sought to intervene, either before or after the order of dismissal, as in the cited case of *United Airlines, Inc.* v. *McDonald,* 432 U.S. 385, 97 S.Ct. 2464 (1977), although the seven months' lapse of time between the denial of class certification and the final order of dismissal afforded ample time.

Rule 23 adds nothing. It does not purport to abolish the substantive right of a defendant to buy peace or the right of a party to be free of federal litigation which is moot for whatever cause. Even if the rule sought to reject these traditional rights, it would have signified nothing, because the Federal Rules of Civil Procedure cannot be used to affect substantive rights, 28 U.S.C., §2072, or to enlarge the jurisdiction of federal courts. *United States* v. *Sherwood,* 312 U.S. 584, 61 S.Ct. 767 (1941).

V.

There Are No Exceptions Which Apply to This Case

One so-called exception to the mootness doctrine may arise where injunctive relief is sought against a continuing

violation of federal law and the violation ceases for one reason or another. If the violation is "capable of repetition, yet evading review", the chance that the plaintiff may again be exposed, if substantial, may prevent his action from being moot. His personal interest stake lies with the right to protection against a threatened repetition. Cf. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 73 S.Ct. 894 (1953); *Sosna* v. *Iowa*, 419 U.S. 393, 95 S.Ct. 553 (1975); *Weinstein* v. *Bradford*, 423 U.S. 147, 96 S.Ct. 347 (1975); *County of Los Angeles* v. *Van Davis*, ... U.S. ....., ... S.Ct. ....., No. 77-1553, 47 Law Week 4317 (March 27, 1979).

Obviously, the case at bar does not fit the pattern of such cases. No injunctive relief is requested. The plaintiffs' only personal interest stake was their individual demand for a money recovery for past alleged overcharges. Indeed, the violation, if any, could not be repeated, because in 1974, the state revised its interest statutes to increase the allowable rate to more than the level complained of in the Complaint.[7] (Add. D, infra). There is not even any evidence to show that the plaintiffs continue to hold bank credit cards.

Another exception is applied by one circuit, but rejected by another, where the claim of the named plaintiffs is satisfied by a tender made during pendency of a motion for certification and before the District Court has had time to rule on the motion.

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7. National banks are entitled to collect a rate equal to that chargeable by the state's "most favored lender". *Marquette Nat. Bank of Minneapolis* v. *First of Omaha Service Corp.*, 99 S.Ct. 540 (1978), N. 26 at 548; *Fisher* v. *First Nat. Bank of Omaha*, 548 F.2d 255 (1977).

While the view which would preclude a tender to allow for a ruling on a prior motion for certification finds no support in decisions of the Supreme Court, it is mentioned for comparative purposes and to note that the exception, if valid, does not fit the present case.

Notable for this distinction is the ruling of the Seventh Circuit in the very recent case of *Susman* v. *Lincoln American Corp.*, 587 F.2d 866 (CA 7, Oct. 14, 1978), Petition for Certiorari pending, No. 78-1169:

> "We hold, therefore, that when a motion for class certification has been pursued with reasonable diligence and is then pending before the district court, a case does not become moot merely because of the tender to the named plaintiffs of their individual money damages. . . ." (587 F.2d at 870)

The *Susman* case distinguishes *Winokur* v. *Bell Federal Savings and Loan*, supra, on the factual basis that *Winokur* involved a tender after denial and *Susman* involved a tender while the motion was pending and before the trial judge could rule on the motion.[8]

The Fifth Circuit recognized the same distinction in *Pearson* v. *Ecological Service Corp.*, 522 F.2d 171 (CA 5, 1975), but disregarded it in the case at bar, when holding that the case did not become moot in either event, if the Court of Appeals chose to find error in the denial.

In any event, the present case is quite different. Here, the motion seeking certification was pending for several years and a full record was developed upon all aspects of the class issue and the District Court had every oppor-

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8. The *Susman* Court acknowledged a conflict, saying:

> "We acknowledge the conflict between this decision and that of the Eighth Circuit in Bradley v. Housing Authority of Kansas City, Missouri, 512 F.2d 626 (8th Cir. 1975). . . ."

tunity to rule and did rule elaborately on the motion. (A. 29-47) The tender was made over seven months after the District Court had denied the request for class status. (A. 48-57)

Although not an exception in the strict sense, there are cases which, because of their nature, might tempt a Court to expand the "actual cases and controversies" concept beyond its normal reach in the face of highly important issues which need to be resolved in the public interest. Although the public significance of an issue has not heretofore caused this Court to decide a moot question, such considerations have influenced the lower Courts in some instances to use artificial respiration to keep actions alive in order to address and resolve the great social reform issues of the day. It has been so with the Fifth Circuit, - hence the importance here of making the distinction which should separate the instant commercial type damage suit from the public policy-making decisions of a different dimension.

For purposes of this comparison, reference may be had to a series of decisions of the Fifth Circuit dealing with discrimination in violation of Title VII of the Civil Rights Act of 1964. 42 U.S.C., §2000e, et seq. Cf. *Jenkins* v. *United Gas Corp.*, 400 F.2d 29 (1968); *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303 (CA 5, 1970).

In these cases, the Fifth Circuit views a job discrimination suit as "perforce a class action" with "heavy overtones of public interest" and the plaintiff as a "private Attorney General" who takes on the "mantle of the sovereign". The Court in such cases views itself as having a "special responsibility to resolve the employment dispute by determining the facts regardless of the individual plaintiff's position". Once the judicial machinery has been set in train, it is considered that "the proceeding takes on a

public character in which remedies are devised to vindicate the policies of the Act, not merely to afford private relief to the employee." In *McArthur* v. *Southern Airways, Inc.*, 556 F.2d 298 (CA 5, 1977)[9] the same Court ruled that a Title VII suit was "presumed to be a proper class suit" and could not be settled except under Subdivision (e) of Rule 23, as in cases where a class is precedently certified.

It is clear from the above cited cases that a "controversy" in Civil Rights actions is being artificially kept alive after it is legally dead under ordinary circumstances, because of the desire of the Court to address and resolve the issue in the public interest, and that traditional definitions of "actual cases or controversies" have been abandoned.

Whether this approach can be squared with Article III in Civil Rights cases is a question for another day. The fact remains that there is no reason to apply the rationale of those cases to the case at bar for the reasons stated below.

Unlike the Civil Rights cases which are quasi-public in nature, the instant case is a purely commercial type lawsuit seeking a money recovery only in behalf of the named plaintiffs. The only thing out of the ordinary about it is the effort, in the plaintiffs' names, to solicit, under the aegis of the Court, some 90,000 potential small claims for litigation in the federal district court, with the constant danger, if not the certainty, that the action will degenerate in practice into multiple lawsuits to be separately tried. The potential members of the class have very little, if anything at all, to gain. The real parties in interest are quite obviously the lawyers appearing for the nominal plaintiffs.

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9. This opinion was vacated en banc on other grounds in *McArthur* v. *Southern Airways, Inc.*, 569 F.2d 276 (CA 5): "That opinion is vacated so as to leave open in this circuit all issues decided here."

There is no evidence of any real interest in the litigation from card holders in the putative class. There is no significant public interest involved. Instead, the aggregation of usury claims in the class action format violates the articulated public policy of the state and is viewed and condemned on the state level as a legal fraud.[10] The fact that there were no violations of underlying state policy related to permissible service charges is underscored by the fact that Mississippi has legislatively endorsed and allowed to be collected the very same service charges which are claimed here to be usurious[11] and has made its laws on this score retroactive.[12] There is no overwhelming federal social policy involved. No injunctive relief is sought or available. In brief, even if policy consideration could change the requirements of Article III of the Constitution, there are no circumstances present here which might serve

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10. See *Fry* v. *Layton*, 191 Miss. 17, 2 So.2d 561 (1941), and *Liddell* v. *Litton Systems, Inc.*, 300 So.2d 455 (Miss., 1974). Cf. Point II, pp. 19-21, Petition for Writ of Certiorari, this Case No. 78-904; Opinion of the U. S. District Court. (A. 29-47) The District Court concluded:

> "Moreover, the Court would be hard pressed to conclude that the aggregation of usury claims against this national bank was superior for the 'fair' adjudication of the controversy in the very face of the clear holding of the Mississippi Court that such amounts to a 'legal fraud' by borrowers contrary to the intent of the state's statutes on usury. Rule 23 was not designed as a device to perpetrate a legal fraud." (See Opinion, A. 45-46. Cf. same Opinion at A. 43-44)

11. Miss. Code 1972 §75-17-1. (Add. D, infra) In 1974, Mississippi revised and modernized its interest statutes, allowing contractual service and interest charges ranging from 10% to 36% and specifically allowing a rate of 18% per annum on revolving charge accounts and bank credit cards. These provisions inure to the benefit of National Banks under their "most favored lender" status. *Fisher* v. *First Nat. Bank of Omaha*, 548 F.2d 255 (CA 8, 1977); *Marquette Nat. Bank of Minneapolis* v. *First of Omaha Service Corp.*, 99 S.Ct. 540 (1978), N. 26, p. 548.

12. Miss. Code 1972, §75-17-17 (Add. D, page 46, infra); *Cappaert* v. *Burman*, 339 So.2d 1355 (Miss. 1976).

as a temptation to broaden the traditional concept of a case or controversy for jurisdictional purposes.

A final exception has been recognized which serves to open the door of the trial court to post judgment interventions, provided the interventions are timely. In this situation, a member of the rejected class in a Title VII suit has been allowed to intervene after a decision denying class certification for the purpose of appealing the adverse class determination order. *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 97 S.Ct. 2464 (1977).

To what extent the quasi-public nature of the cited case may have influenced the Court's indulgence is not indicated in the opinion, but the exception, if such it is, has no application here, because no one asked leave to intervene in the case for purposes of appeal or otherwise, and there was no party to the appeal who maintained a live controversy with the defendant. Indeed, the very existence of the exception underscores the fact of mootness when, as here, there is no intervention by one retaining a live controversy.

DISCUSSION OF OPINION BELOW

As previously noted, the decision is in direct conflict with the Seventh Circuit's decision in *Winokur* v. *Bell Federal Savings and Loan*, 560 F.2d 271 (CA 7, 1977), reh. den. en banc, 562 F.2d 1034, cert. den., 98 S.Ct. 1507 (1978), and with its own prior decision in *Pearson* v. *Ecological Service Corp.*, 522 F.2d 171 (CA 5, 1975), cert. denied sub nom., 425 U.S. 912, 96 S.Ct. 1508 (1976), yet neither case is acknowledged as being in conflict. *Winokur* is not mentioned and *Pearson* is miscited to a statement which is clearly and directly contradictory to what the Court had held.

Also, as previously noted, the decision conflicts with at least five decisions of this Court, these being *O'Shea* v. *Littleton*, 414 U.S. 488, 94 S.Ct. 669 (1974); *Board of School Commissioners of City of Indianapolis* v. *Jacobs*, 420 U.S. 128, 95 S.Ct. 848 (1975); *Baxter* v. *Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551 (1976); *Weinstein* v. *Bradford*, 423 U.S. 147, 96 S.Ct. 347 (1975); and *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 96 S.Ct. 2697 (1976).

Significantly, not one of the cases from this Court was even mentioned in the opinion of the Fifth Circuit.

The central theme of the decision of the Court of Appeals is contained in this language from the opinion:

> ". . . By the very act of filing a class action, the class representatives assume responsibilities to members of the class. They may not terminate their duties by taking satisfaction; a cease-fire may not be pressed upon them by paying their claims. The court itself has special responsibilities to ensure that the dismissal does not prejudice putative members.
>
> "Even if the court should have permitted the bank to pay off the named plaintiffs, either with their acquiescence or over their objection, this satisfaction of their claims could not preclude them from appealing the denial of certification, nor would it excuse them from their duty of doing so absent express approval by the trial court. . . ."

As emphasized previously, this is a commercial type lawsuit seeking only money and there is no community of interest among the 90,000 card holders. The would-be class representative is not a federal private Attorney General charged with the obligation to serve the public interest. Contrary to its own express holding in *Pearson*, the Court ignores the difference between a class action and a non-

class action and places undeserved emphasis upon mere allegations of class action status rather than upon due certification.

Since the District Court declined to grant class action status, the case was stripped of its character as a class action, even if it could have qualified upon the basis of a mere allegation in the Complaint. In *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 97 S.Ct. 2464 (1977), the Court adopted the Advisory Committee's note, holding:

> ". . . To be sure, the case was 'stripped of its character as a class action' upon denial of certification by the District Court. Advisory Committee's Note on the 1966 Amendments to Rule 23, 28 U.S.C.App., p. 7767. . . ." (97 S.Ct. at 2469)

It was explicitly so held in *Pearson*, supra, but the Court ignored the admonition on the view that the self-styled class representative continued to have responsibilities to the uncertified class after certification was denied. Indeed, the "duties" to the unnamed and nameless members of the putative class were found to be incapable of termination by satisfaction, whether with their acquiescence or over their objection, short of an appeal from the class denial and an affirmance on review.

The view that the mere filing of a damage action as a class action makes it such and projects duties to the unknown members of a putative class which prevents termination of the action by satisfaction or dismissal without appeal simply rewrites Rule 23 and requires that every case involving class action allegations will have to be tried on its merits in the District Court and reviewed on appeal before an end can be brought to the action. The adverse impact of such a decision upon both litigants and courts should be obvious.

No such court-imposed "duty" to continue litigation after the personal interest stake has been lost has ever heretofore been considered as a substitute for the personal stake required for Article III jurisdiction.

Finally, the Fifth Circuit refers to the "special responsibilities" which the Court has to insure that a dismissal "does not prejudice putative members". But the Court fails to suggest how the dismissal in the case at bar can serve to prejudice putative members. Indeed, the dismissal order very carefully provides that the dismissal is without prejudice (A. 61), and no prejudice is apparent, since those individuals retained the very same rights which they always had, including the option to sue or stay out of Court according to their own desires.

The Court argues that the nominal plaintiffs would "maintain a nexus" with the class, despite satisfaction of their own claims. But the Court does not explain or define the "nexus" and its existence is not apparent.

Even so, a "nexus", whatever else that may be, is not the same as a personal interest stake in the outcome of the litigation. The plaintiffs have no such personal stake. The "class" has no legal status, even if one or more of its members were aggrieved and were potential parties. Standing in the jurisdictional sense cannot exist without a continuing real personal stake in the outcome of the litigation. The only ones left with a personal interest stake are the lawyers for the plaintiffs who seek the court's aid to solicit others to become parties. They are not parties themselves and cannot supply the missing jurisdiction.

CONCLUSION

We respectfully submit that the decision of the Court of Appeals should be vacated with directions to dismiss the appeal and reinstate the dismissal judgment of the District Court.

Respectfully submitted,

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ADDENDUM

ADDENDUM A

UNITED STATES CONSTITUTION

Article III.—The Judiciary

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

ADDENDUM B

12 U.S.C. § 85

§ 85. Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

As amended Oct. 29, 1974, Pub.L. 93-501, Title II, § 201, 88 Stat. 1558.

ADDENDUM C

12 U.S.C. § 86

§ 86. Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred. R.S. § 5198.

ADDENDUM D

MISSISSIPPI CODE OF 1972

CHAPTER 17

Interest

§ 75-17-1. Legal rates of interest and finance charges.

(1) The legal rate of interest on all notes, accounts and contracts shall be six percent (6%) per annum, calculated according to the actuarial method, but contracts may be made, in writing, for payment of a finance charge as otherwise provided by this section or as otherwise authorized by law.

(2) Any borrower may contract for and agree to pay a finance charge for any loan or other extension of credit made directly or indirectly to a borrower, which will result in a yield not to exceed ten percent (10%) per annum, calculated according to the actuarial method, which shall be known as the contract rate.

(3) Notwithstanding the foregoing and any other provision of law to the contrary, any domestic or foreign corporation organized for profit may agree to pay any rate of finance charge in excess of the maximum rate provided in this section, but not to exceed fifteen percent (15%) per annum, calculated according to the actuarial method, on any contract or other obligation under which the principal balance to be repaid shall originally exceed two thousand five hundred dollars ($2,500.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally proposed to be advanced shall exceed two thousand five hundred dollars ($2,500.00), or on any extension or renewal thereof;

and as to any such agreement, the claim or defense of usury by such corporation, its successors, guarantors, assigns, or anyone on its behalf is prohibited.

(4) Notwithstanding the foregoing and any other provision of law to the contrary, any nonprofit corporation organized to own, operate or finance any educational facility or function may agree to pay any rate of finance charge in excess of the maximum rate provided in this section, but not to exceed fifteen percent (15%) per annum, calculated according to the actuarial method, on any contract or other obligation under which the principal balance to be repaid shall originally exceed two thousand five hundred dollars ($2,500.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally proposed to be advanced shall exceed two thousand five hundred dollars ($2,500.00), or on any extension or renewal thereof; and as to any such agreement, the claim or defense of usury by such corporation, its successors, guarantors, assigns, or anyone on its behalf is prohibited.

(5) Notwithstanding the foregoing and any other provision of law to the contrary, any partnership may agree to pay any rate of finance charge in excess of the maximum rate provided in this section but not to exceed fifteen percent (15%) per annum, calculated according to the actuarial method, on any contract or other obligation under which the principal balance to be repaid shall originally exceed two hundred fifty thousand dollars ($250,000.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally contracted in writing to be advanced shall exceed two hundred fifty thousand dollars ($250,000.00), or on any extension or renewal thereof; and as to any such agreement, the claim or defense of usury by such partnership or its guarantors, assigns, or anyone on its behalf is prohibited. This paragraph shall not apply to any contract or other obligation relating to the purchase of agricultural lands or secured by security instrument on agricultural lands or the financing of the production of agricultural products or livestock, agricultural processing or other manufacturing businesses.

(6) Notwithstanding the foregoing and any other provision of law to the contrary, any retail seller, and any lender or issuer of credit cards may lawfully contract for and receive a finance charge for credit sales of goods, services or merchandise certificates or for cash advanced or other credit extended pursuant to a revolving charge agreement by applying a periodic rate no greater than one and one-half percent (1 1/2%) per month to:

(a) the average daily balance of the account, exclusive of finance charge, in each billing period;

(b) an amount that shall not exceed the balance of the account, exclusive of finance charge, on the first day of each billing period without adding purchases or miscellaneous debits to the account during the billing period; or

(c) any balance of the account during each billing period which does not produce an amount of finance charge in excess of that permitted by (a) or (b).

Notwithstanding the foregoing, the maximum finance charge which may be charged or collected on any balance in excess of eight hundred dollars ($800.00) shall be determined by applying a periodic rate no greater than one and one-quarter percent (1¼%) per month to that portion of the applicable balance which is in excess of eight hundred dollars ($800.00) but not greater than twelve hundred dollars ($1200.00) and by applying a periodic rate not greater than one percent (1%) of the principal balance which exceeds twelve hundred dollars ($1200.00).

No finance charge may be charged or collected for purchases of goods or services or merchandise certificates until one (1) month after the billing statement date on the billing statement where such purchases of goods or services initially appear. The billing statement shall not state that Mississippi law requires the imposition of a finance charge. The term "month" as used in this paragraph (6) means either (1) a calendar month, or (2) a minimum of thirty (30) consecutive calendar days, or (3) the number of days elapsing between the same numerical calendar day of successive calendar month. "Revolving charge agreement" means an agreement by the terms of which retail sellers may sell goods, services, merchandise certificates, or by which a lender or issuer finances the purchase of goods or services or by which a lender makes cash advances, by the use of credit cards or otherwise, pursuant to which the amount financed is payable either within a stated period or in installments over a period of time, and the terms of which may provide for finance charges to be assessed on the unpaid balance as it exists from time to time; the term "revolving charge agreement" does not include the lending of money evidenced by a promissory note.

(7) Notwithstanding the foregoing and any other provision of law to the contrary, the maximum finance charge which may be contracted for and received for any loan or extension of credit made by a licensee under the Small Loan Regulatory Law (Sections 75-67-101 through 75-67-135, Mississippi Code of 1972), and the Small Loan Privilege Tax Law (Sections 75-67-201 through 75-67-243, Mississippi Code of 1972), may result in a yield not to exceed the following annual percentage rates calculated according to the actuarial method:

(a) Thirty-six percent (36%) per annum for the portion of the unpaid balance of the amount financed that is not greater than six hundred dollars ($600.00);

(b) Thirty-three percent (33%) per annum for the portion of the unpaid balance of the amount financed in excess of six hundred dollars ($600.00) but not greater than eighteen hundred dollars ($1800.00);

(c) Twenty-four percent (24%) per annum for the portion of the unpaid balance of the amount financed in excess of eighteen hundred dollars ($1800.00) but not greater than forty-five hundred dollars ($4500.00);

(d) Twelve percent (12%) per annum for the portion of the unpaid balance of the amount financed in excess of forty-five hundred dollars ($4500.00).

Nothing in this paragraph (7) shall prohibit lending money or handling, negotiating or arranging loans for a finance charge that is less than that specified herein. This paragraph (7) does not limit or restrict the manner of contracting for the finance charge whether by way of add-on discount, or otherwise, so long as the annual percentage rate of the finance charges does not exceed that permitted by this section.

(8) Notwithstanding the foregoing or any other provision of law to the contrary, the maximum finance charge which may be contracted for or received for any loan or extension of credit made by any lender or by any retail seller in connection with sales of manufactured moveable homes, commonly known as mobile homes, may result in a yield not to exceed the following annual percentage rates calculated according to the actuarial method:

(a) Twenty-five percent (25%) per annum on that part of the unpaid balance of the amount financed which does not exceed one thousand dollars ($1,000.00);

(b) Eighteen percent (18%) per annum on the part of the unpaid balance of the amount financed which is more than one thousand dollars ($1,000.00) but does not exceed two thousand five hundred dollars ($2,500.00);

(c) Twelve percent (12%) per annum on that part of the unpaid balance of the amount financed which is more than two thousand five hundred dollars ($2,500.00).

(9) The term "finance charge" as used in this section and in sections 75-17-13, through 75-17-17, 63-17-13, 75-67-127 and 75-67-217 means the amount or rate paid or payable, directly or indirectly, by a debtor for receiving a loan or incident to or as a condition of the extension of credit, including but not limited to interest, brokerage fees, finance charges, loan fees, discount, points, service charges, transaction charges, activity charges, carrying charges, finders fees or any other cost or expense to the debtor for services rendered or to be rendered to the debtor in making, arranging or negotiating a loan of money or an extension of credit and for the accounting, guaranteeing, endorsing, collecting and other actual services rendered by the lender; provided, however, that recording fees, motor vehicle title fees, attorney's fees, insurance premiums, fees permitted to be charged under the provisions of section 79-7-7, Mississippi Code of 1972, and with respect to a debt secured by an interest in land, bona fide closing costs and appraisal fees incidental to the transaction shall not be included in the finance charge. Subject to the other provisions of this section and sections 75-17-13 through 75-17-17, 63-17-13, 75-67-127 and 75-67-217, the finance charge may be calculated on the assumption that the indebtedness will be discharged as it becomes due, and prepayment penalties and statutory default charges shall not be included in the finance charges. None of the previous paragraphs shall limit or restrict the manner of contracting for such finance charge, whether by way of add-on, discount, or otherwise, so long as the annual percentage rate does not exceed that permitted by law. If a greater finance charge than that authorized by this section or by other applicable law shall be stipulated for or received in any case, all interest and finance charge shall be forfeited, and may be recovered back, whether the contract be executed or executory. If a finance charge be contracted for or received that exceeds the maximum authorized by law by more than one hundred percent (100%), the principal and all finance charges shall be forfeited and any amount paid may be recovered by suit. The provisions of this section shall not restrict the extension of credit pursuant to any other applicable law. A licensee under the Small Loan Regulatory Law (Sections 75-67-101 through 75-67-135, Mississippi Code of 1972), and the Small Loan Privilege Tax Law (Sections 75-67-201 through 75-67-243, Mississippi Code of 1972), may contract for and receive finance charges as authorized by paragraph (7) hereof regardless of the purpose for which the loan or other extension of credit is made.

(10) No lender or other person shall use multiple notes, accounts, contracts or agreements with intent to obtain a higher finance charge than permitted by law. If a finance charge be stipulated for or received in any case in violation of this paragraph, all interest and finance charge shall be forfeited.

(11) No lender or other person shall charge a sum or prepayment penalty for the prepayment of any note or evidence of a debt secured in whole or in part by lien on real estate greater than the following:

(a) Five percent (5%) of the unpaid principal balance if prepaid during the first year;

(b) Four percent (4%) of the unpaid principal balance if prepaid during the second year;

(c) Three percent (3%) of the unpaid principal balance if prepaid during the third year;

(d) Two percent (2%) of the unpaid principal balance if prepaid during the fourth year;

(e) One percent (1%) of the unpaid principal balance if prepaid during the fifth year;

(f) No penalty if prepaid more than five (5) years from date of the note creating the debt.

Provided, that this paragraph shall apply only to loans, the security for which is a lien on real estate comprising a single family dwelling or a single family condominium unit, or on real estate used primarily for agricultural or livestock purposes; further provided that this paragraph shall not apply where a greater penalty is required by any law or regulation of the United States of America, or agency thereof.

SOURCES: Laws, 1972, ch. 436, § 1; 1973, ch. 387, § 1; 1974, ch. 564, § 1, eff from and after July 1, 1974, eff from and after passage (approved March 27, 1973).

§ 75-17-17. Law governing loans made or credit extended prior to July 1, 1974.

Loans made and credit extended prior to July 1, 1974 shall continue to be governed by the provisions of laws governing such loans and extensions of credit which were in force at the time such loans or extensions of credit were made, including laws repealed hereby except that finance charges contracted for or received prior to July 1, 1974 shall not be unlawful if the finance charge contracted for or received conforms with the provisions of this act or other law then in effect. Any loan or note renewed, refinanced, deferred or otherwise extended or altered on or after July 1, 1974 shall conform with the provisions of sections 63-17-13, 75-17-1, 75-17-13 through 75-17-17, 75-67-127 and 75-67-217.

SOURCES: Laws, 1974, ch. 564 § 7, eff from and after July 1, 1974.